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No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

SOLARCITY CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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SolarCity agrees that the courts of appeals are avowedly divided about whether public entities can immediately appeal denials of state-action immunity. And it never disputes that question's importance. It nonetheless urges this Court to decline to resolve the division. Its arguments for doing so lack merit.

ARGUMENT

I. THIS CASE IMPLICATES THE ENTRENCHED CIRCUIT CONFLICT THAT SOLARCITY ACKNOWLEDGES

SolarCity asserts (Opp. 6-9, 17-18) that although there is a mature circuit conflict over the question presented, that conflict is not implicated here because the District (SolarCity claims) is a private entity, not pub-

lic. That claim defies Arizona law, this Court's precedent, and the decision below.[1]

1. Under Arizona law, the District and similar entities are "public, political ... subdivision[s] of the state," Ariz. Rev. Stat. §48-2302, "vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted[,] ... political subdivisions," Ariz. Const. art. XIII, §7. Accordingly, Arizona courts have rejected SolarCity's argument that the District is private, holding that "[t]he fact that the Salt River Project sells surplus power as a revenue source in its proprietary capacity does not defeat its status as a ... political subdivision of the state." *Salt River Project Agricultural Improvement & Power District* v. *City of Phoenix*, 631 P.2d 553, 555 (Ariz. Ct. App. 1981) (citing Arizona Supreme Court precedent). That holding recognizes that even when acting in a proprietary capacity, public utilities are—as amici here confirm (Br. 4-10)—serving essential public purposes.

SolarCity's footnoted response (Opp. 26-27 n.4) is that "state-law labels do not control the federal antitrust inquiry." But unlike in the case SolarCity cites, the state here has not merely employed a label. Rather, Arizona's constitution, as noted, confers substantive rights and immunities on the District. Arizona's legislature has also given the District significant governmental powers, authorizing it to "establish and enforce laws, rules and regulations necessary to carry on the District's business, construct works for irrigation,

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[1] In any event, contrary to SolarCity's assertion (Opp. 2), there is a circuit conflict even as to immediate appeals by private entities. *See Auraria Student Housing at the Regency, LLC* v. *Campus Village Apartments, LLC*, 703 F.3d 1147, 1151 (10th Cir. 2013).

drainage, and power, levy taxes on real property within the District, sell tax-exempt bonds, and exercise the power of eminent domain." *Smith* v. *Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 589 (9th Cir. 1997) (citing relevant statutes). SolarCity provides no sound basis for this Court to hold the District to be private notwithstanding these constitutional and statutory provisions, as well as decades of Arizona cases interpreting them—cases that SolarCity recognizes are pertinent to the analysis, as its own arguments repeatedly cite them (Opp. 7, 8, 27).

2. Were there any remaining doubt about the District's public character, it would be dispelled by *Ball* v. *James*, 451 U.S. 355 (1981). There the Court, despite fully understanding the District's proprietary functions (which it analyzed in detail), described the District as a "governmental body," "a governmental entity," and a "public entity." *Id.* at 357. And critically, the Court did not hold the District exempt from the Equal Protection Clause, as a private entity would be. Rather, the Court subjected the District to the equal-protection standard set forth in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). *See Ball*, 451 U.S. at 362-371. Although the petition explained this dispositive point (at 18-19), SolarCity simply ignores it.

3. Not surprisingly given the foregoing, the Ninth Circuit rejected SolarCity's argument that the District is private, resting its decision on the premise that the District is a "a political subdivision of Arizona." Pet. App. 3a. That is why the court stated that its ruling accorded or conflicted with decisions of four other circuits *that involved public entities*. Pet. App. 14a-17a. SolarCity's effort to revive arguments rejected by the decision below underscores the infirmity of its claim that the question presented is not implicated here.

II. THE CIRCUIT CONFLICT WILL NOT RESOLVE ITSELF

SolarCity contends (Opp. 13) that even if this case implicates the circuit conflict over whether public entities can immediately appeal denials of state-action immunity, certiorari is unwarranted because the conflict "is ... on its way to resolving itself based on this Court's more recent guidance concerning the collateral-order and state-action[-immunity] doctrines." That is wishful thinking.

To begin with, as was true below (*see* Pet. 15), SolarCity cites nothing here (no opinion suggesting the need for en banc review, no dissent from a rehearing denial, not even a call for an en banc vote) suggesting the Eleventh Circuit will revisit its holding in *Commuter Transportation Systems, Inc.* v. *Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), that denials of state-action immunity to public entities are immediately appealable. Nor does SolarCity deny that, as the petition explained (at 15), the Eleventh Circuit adhered to that holding in *Danner Construction Co.* v. *Hillsborough County*, 608 F.3d 809 (11th Cir. 2010)—which was decided *after* every one of the collateral-order rulings from this Court that SolarCity claims (Opp. 4, 21-22) will lead to the circuit conflict resolving itself.[2]

SolarCity is therefore reduced to speculating (Opp. 20) that the Eleventh Circuit might revisit its *collateral-order* precedent because of this Court's post-2010 *state-action-immunity* decisions. Even putting aside the implausibility of such a cross-doctrinal effect, noth-

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[2] *Danner*'s adherence to *Commuter Transportation* is unsurprising, because this Court's recent collateral-order decisions did not change the doctrine. *See* Pet. 17.

ing in the decisions SolarCity invokes—*North Carolina State Board of Dental Examiners* v. *FTC*, 135 S. Ct. 1101 (2015), and *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216 (2013)—meaningfully changed the state-action-immunity doctrine. Indeed, what SolarCity apparently views as the sea change in those cases, namely the notion that state-action immunity is "disfavored" (Opp. 3, 5, 30), actually dates to 1992, long before the Eleventh Circuit reaffirmed *Commuter Transportation* in 2010. *See FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 636 (1992). Both *North Carolina State Board* and *Phoebe Putney* reiterated, moreover, that state-action immunity rests on state sovereignty and federalism, *see* 135 S. Ct. at 1110; 568 U.S. at 224, 236—which is the same reason that the Eleventh Circuit deemed denials of state-action immunity immediately appealable, *see Commuter Transportation*, 801 F.2d at 1289. There is thus no basis to conclude that this Court's recent decisions will induce any rethinking by that circuit.

SolarCity next asserts (Opp. 20) that the Eleventh Circuit might overrule its precedent because of other circuits' decisions. That is likewise highly improbable. All of those decisions (save the decision below, which largely tracked other courts' analysis of the question presented) predate *Danner*, when the Eleventh Circuit, as noted, stood by its precedent.[3]

Although the foregoing suffices to reject SolarCity's claim that the circuit conflict will resolve itself—because SolarCity does not dispute that having even one circuit in conflict with others would warrant certio-

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[3] *Danner* also belies SolarCity's repeated claim (*e.g.*, Opp. 13) that "No Decision in the Past Two Decades Supports SRP's Position."

rari (*see* Pet. 15)—SolarCity's arguments regarding the Fifth Circuit are equally flawed. In particular, SolarCity attempts to make lemonade out of lemons when discussing *Acoustic Systems, Inc.* v. *Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000), which *adhered* to *Martin* v. *Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996). SolarCity claims (Opp. 19) that *Acoustic Systems* actually "narrowed" *Martin*'s holding that denials of state-action immunity to public entities are immediately appealable. But as SolarCity acknowledges (Opp. 16), *Acoustic Systems* did so only in that it declined to extend *Martin* to private defendants. That does not change the crucial fact (which SolarCity never denies) that *Acoustic Systems* adhered to *Martin* regarding public defendants.

Put simply, it is exceedingly unlikely that the Fifth and Eleventh Circuits, having made no move to date to revisit their decades-old precedent, will both suddenly take the rare step of convening en banc to do so—particularly because this Court's recent collateral-order and state-action-immunity decisions broke no new ground, and because neither court could by itself eliminate the circuit conflict via en banc proceedings.

III. SolarCity Identifies No Barrier To Resolving The Circuit Conflict Here

SolarCity contends (Opp. 22-25) that this is a poor vehicle to answer the question presented, for three reasons. (A promised "four[th] independent reason[]" (Opp. 22) is never given.) All three are unpersuasive, but regardless, none is actually a vehicle problem, as

none could prevent the Court from deciding the question presented.[4]

1. SolarCity asserts (Opp. 22-23) that the district court's denial of state-action immunity does not satisfy the collateral-order doctrine's requirement that the denial be conclusive. But that is not a vehicle problem; it is a component of the question presented (one fully briefed below and addressed by other circuits, *see* Pet. 23). SolarCity itself confirms this, by including conclusiveness in its merits arguments (Opp. 25-26). Hence, while conclusiveness could in theory be a reason to affirm—though it isn't, as explained immediately below—it is not a reason to deny certiorari, and certainly not a reason this Court would be prevented from deciding the question presented if it granted review.

That aside, SolarCity errs in claiming that the order here is not conclusive. The basis for that claim—SolarCity's suggestion that the district court might revisit the order—is irrelevant to conclusiveness. What matters is not whether a particular judge might revisit one particular denial order, but rather whether "a district court *ordinarily* would expect to reassess and revise" the type of order in question. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277 (1988) (emphasis added). As the petition explained (at 31-32), orders denying state-action immunity do not satisfy that standard, certainly where (as here) immun-

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[4] SolarCity rightly does not argue that this case could be moot before the Court could decide it. As the petition explained (at 24), that argument would fail. In any event, as the petition also stated (at 24-25), if certiorari is granted this Court could—to eliminate any concern about mootness—stay further district-court proceedings, either *sua sponte* or on an application the District would file if the lower courts denied a stay.

ity is denied on legal rather than (as SolarCity wrongly implies (Opp. 23)) factual grounds.

2. SolarCity next contends (Opp. 23) that a reversal here would not "allow SRP to avoid [this] litigation" entirely, because state-action immunity supposedly would not bar SolarCity's state-law antitrust claims. But again, even if correct, that would not bar this Court from answering the question presented.

At any rate, the argument is incorrect. As the petition explained (at 23), the Ninth Circuit held in *Mothershed* v. *Justices of the Supreme Court*, 410 F.3d 602, 609 (9th Cir. 2005), that Arizona antitrust law tracks federal law and thus incorporates state-action immunity. SolarCity suggests (Opp. 24-25) that *Mothershed* is inapplicable here because a statutory provision states that Arizona's antitrust law "appl[ies] to the provisions of competitive electric generation service or other services by public power entities." Ariz. Rev. Stat. §30-813. But that provision does not help SolarCity because—as *Mothershed* held—Arizona's antitrust law (like its federal counterpart) *includes* the state-action-immunity doctrine.

SolarCity also argues (Opp. 25) that "*Mothershed* is both indefensible as a matter of logic ... and outdated." As the District explained below, that is wrong. *See* C.A. Dkt. 89 at 4-5 (July 3, 2017). Indeed, by statute, Arizona's antitrust law does not apply to District activity "approved by a statute of this state." Ariz. Rev. Stat. §48-247. But regardless, *Mothershed* is indisputably binding Ninth Circuit precedent—and hence would require dismissal of SolarCity's Arizona antitrust claim if the District were ultimately held to have state-action immunity. To the extent SolarCity is suggesting that this Court could abrogate *Mothershed* here, that is

wrong for reasons SolarCity itself gives (Opp. 25), i.e., that "no court below addressed ... *Mothershed*" and "Arizona state law is not appropriately before this Court."

3. SolarCity asserts (Opp. 25) that because the petition stated (at 2-3) that state-action immunity is "irredeemably lost" once a public entity is "subjected to the burdens of litigation beyond a motion to dismiss," the District—having litigated past that point here—must have no continuing interest requiring vindication by this Court.

Respectfully, that argument borders on silly. The point plainly being made in the passage SolarCity quotes (as in the rest of the petition) is that denials of state-action immunity are effectively unreviewable after final judgment for the same reason that denials of sovereign and qualified immunity are, namely that getting to final judgment requires enduring "months or years of burdensome or intrusive litigation" (Pet. 30), by which point the immunity has been lost because it is an immunity from suit and not just from liability. This Court has never held that any litigation beyond the motion-to-dismiss stage prevents an interlocutory appeal of a denial of qualified or sovereign immunity, and SolarCity does not even try to defend such an approach here. Its resort to mischaracterizing the District's straightforward argument in hopes of creating the illusion of a vehicle problem is telling.

IV. THE DECISION BELOW IS WRONG

SolarCity asserts that review is unwarranted because the decision below is correct. That would not justify denying certiorari even if true, given the acknowl-

edged circuit conflict and the undisputed importance of the question presented. But it is not true.

First, SolarCity argues (Opp. 25-26) that "the appealed order did not conclusively resolve any state-action doctrine issue." That is wrong for the reasons discussed above (at 7-8) and in the petition (at 31-32).[5]

Second, SolarCity asserts (Opp. 26-28) that "the state-action doctrine is not completely separate from the merits of [SolarCity's] claims." It bases that argument partly on the notion that any factual disputes relevant to state-action immunity could also bear on the merits. But SolarCity identifies no factual disputes here—not surprisingly given that the district court's ruling was purely legal. Pet. App. 25a-27a. And as the petition explained (at 34), the proper rule in this context is the same one this Court has adopted for qualified immunity: Collateral-order jurisdiction encompasses orders denying immunity as a matter of law, but not those turning on factual issues. *Id.*; Opp. 28. The former class of orders satisfies the separateness requirement.

Disputing this, SolarCity contends (Opp. 26) that to resolve a state-action-immunity claim, a court must consider "the [alleged] anticompetitive conduct" and alleged "anticompetitive effects." This Court has rejected the counterpart to that argument in the qualified-immunity context, holding that "a question of immunity is separate from the merits ... even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue." *Mitchell* v.

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[5] SolarCity ignores the petition's arguments on this point, as on many others.

Forsyth, 472 U.S. 511, 528-529 (1985); *see also id.* at 529-530 n.10. The same is true here.[6]

Finally, SolarCity ignores the District's explanation (Pet. 33-34) of why this Court's precedent shows that the separateness requirement is met here.

Third, SolarCity argues (Opp. 28-31) that state-action immunity is a defense to liability rather than an immunity from suit, and hence denials of the immunity are effectively reviewable on appeal from final judgment. SolarCity's arguments cannot rehabilitate the Ninth Circuit's faulty reasoning on this point (which, notably, SolarCity's discussion barely even cites).

As an initial matter, SolarCity largely ignores the District's central argument (Pet. 25-30) that state-action immunity is much like sovereign and qualified immunity, denials of which are immediately appealable. Like sovereign immunity, state-action immunity partly reflects "the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *North Carolina State Board*, 135 S. Ct. at 1110. And like qualified immunity, state-action immunity ensures that government local officials can perform their work with an eye toward serving the public rather than avoiding litigation. *Commuter Transportation*, 801 F.2d at 1289; Areeda & Hovenkamp, *Fundamentals of Antitrust Law* §2.04[B], at 2-52 (4th ed. & 2015 Supp.).

SolarCity instead argues (Opp. 29) that "there is no reason that SRP, a business enterprise ..., cannot with-

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[6] SolarCity also states (Opp. 26) that to enjoy state-action immunity, the District "must show that it is 'actively supervised' by" Arizona. That is wrong because the District is an electorally accountable public entity. Pet. 2 n.1 (citing cases).

stand the burden and expense of an antitrust trial." That flippant statement cannot obscure either the enormous costs of antitrust litigation, *see Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 558 (2007), or the fact that—as amici explain (Br. 16)—ratepayers ultimately bear the costs when public power entities are subjected to litigation. At any rate, it is irrelevant whether the District can "withstand" litigation costs. Many entities (states, for example) could surely withstand the costs of litigation from which they are shielded by sovereign or qualified immunity. The immunities thus do not just protect their beneficiaries from unbearable costs. Rather, they recognize that subjecting public entities to even non-crippling litigation burdens can harm the public.

SolarCity next argues (Opp. 29-30) that the District should enjoy no greater protection under state-action immunity than under sovereign immunity. That is manifestly wrong. Courts routinely apply state-action immunity to public entities that cannot assert sovereign immunity; indeed, the immunity sometimes extends even to private entities. *See* Pet. 2 n.1. If state-action immunity were coterminous with sovereign immunity, it would serve little purpose. Meanwhile, SolarCity offers no response to the District's core point: Denying state-action immunity in these circumstances derogates state sovereignty by infringing states' fundamental prerogative to regulate their economies within their borders how they choose—including by enlisting political subdivisions to do so.

Lastly, SolarCity argues (Opp. 30-31) that the District's "view has no principled bounds," because "[c]onstitutional principles inform many doctrines that are not immunities." That is a strawman, as the District "has never argued ... that any constitutional rul-

ing is immediately appealable." Pet. 26. Its argument is limited to true immunities from suit. That is a clear, simple, and "principled bound[]."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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